

A Tenaga Nasional Bhd v Teobros Development Sdn Bhd

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO M-02-716
OF 2007

B ABDUL MALIK ISHAK, LOW HOP BING AND SULAIMAN DAUD
JJCA
8 JUNE 2008

C *Civil Procedure — Injunction — Interlocutory injunction — Principles of —
Interlocutory injunction granted to preserve status quo pending disposal of
substantive claim — Whether High Court judge had erred in granting injunction
— Whether respondent had shown serious bona fide issues to be tried — Whether
principles governing grant of injunctions properly applied — Whether discretion
to grant injunction exercised properly*

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E The appellant is a public listed company licensed to supply electricity under
the Electricity Supply Act 1990 ('the Act'). In order to carry out the business
of supplying electricity the appellant has the right to enter private land to
erect pylons for its electricity transmission lines provided it complies strictly
with the requirements of the Act. Alternatively the appellant has the right to
choose to acquire the land, whereon it wants to erect the pylons, permanently
F by resorting to the Land Acquisitions Act 1960 ('the LAA'). The respondent
purchased six lots of land at a public auction held at the Malacca High Court.
According to the respondent the register documents of titles of the six lots of
land showed no endorsements at all of any right of entry of the appellant.
Furthermore, a director of the respondent company gave affidavit evidence
G that the land title searches carried out prior to the auction revealed that there
were endorsements of land acquisition in respect of three of the six lots of the
land but upon enquiries being made it was learnt that they were minor
acquisitions for the purpose of road widening. When the respondent later
drew plans to convert the six lots of land into a housing estate they made
H enquiries at the appellant's office about the future supply of electricity for the
new housing estate. The appellant then disclosed their plans to construct
electricity pylons across three of the six lots of land (the lands) purchased by
the respondent. It was only then that the respondent learnt that the appellant
had issued a notice under s 11(2) of the Act to the previous owner of the
I lands and therefore possessed a way-leave right over the lands and was by
virtue of this right a licensee of the lands. Upon this discovery the respondent
applied to the High Court for, inter alia, declarations which would have the
effect of annulling whatever rights the appellant had to enter the lands. At the
same time the respondent applied for an interlocutory injunction to preserve

the status quo pending the disposal of the respondent's substantive claim and/or some directions or orders to be issued to the appellant by the State Authority of Malacca. The respondent's substantive claim against the appellant centered on the appellant's failure to comply with s 11(10) of the Act. The respondent cited that under s 11(4) of the Act if the owner or occupier of the land chooses to object to the s 11(2) notice then the objection may be made to the District Land Administrator either verbally or in writing. Since an objection could have been lodged by the owner verbally, it became necessary for the appellant licensee to comply with s 11(10) of the Act ie to obtain a written statement from the district land administrator stating that no objection had been lodged by the owner or occupier. The appellant's stand at the High Court was that they had an absolute right to enter the respondent's land and that the search results were in their view immaterial. The High Court judge after reading and examining the whole of s 11 of the Act, and in particular s 11(10) of the Act granted the interlocutory injunction. In this appeal against that decision, the appellant submitted that the High Court judge erred in dealing with s 11(10) of the Act at length and that, in any case, the appellant's duty to comply with s 11(10) of the Act was directory and not mandatory. The appellant also faulted the High Court judge for failing to consider s 11(5) of the Act which had allegedly created a perpetual right of entry for the appellant. In addition the appellant submitted both orally and in its written submission that as a 'public authority' it ought to be regarded favourably by the court.

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Held, dismissing the appeal with costs:

- (1) The identity of the parties in any case is not a factor that will influence the court in its decision making process. Judgments will be rendered according to the facts and the law and not influenced by whether the appellant is the government or a government linked company. In short it is the law and justice of the case that matters (see paras 18–20).
- (2) If the High Court judge was not supposed to consider and construe s 11(10) of the Act, how could he consider and construe s 11(5) of the Act in isolation. Section 11(5) of the Act had to be viewed in its correct perspective because on its own it did not create any right of entry for the appellant. Section 11 and its ten subsections were legislatively enacted to provide a mechanism for a licensee under the Act to obtain a right to enter land to construct electricity pylons and/or lay electricity cables, to protect the rights of the owners and occupiers of the land who are affected by such a right of entry and to ensure that the endorsement of the register document of title of the affected land by giving notice to those who conduct a title search in the future. Although the process starts with the licensee issuing a notice under s 11(2) of the Act to the

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- A owner or occupier, for the notice under s 11(2) of the Act to create any right of entry under s 11(5) of the Act, the licensee must first obtain a statement from the District Land Administrator stating that there was no objection lodged by the owner or occupier. If there is any objection lodged by the owner or occupier of the land then s 11(5) of the Act does
- B not create any right of entry at all. This is because the effect of a notice under s 11(2) of the Act is completely nullified even if there was a verbal objection lodged by an occupier. Therefore the High Court judge had exercised his discretion judiciously in finding that the respondent had a bona fide serious issue to be tried as to whether a licensee could be said
- C to acquire rights under s 11(5) of the Act without complying with s 11(10) (see paras 40–44 & 57).
- (3) It is now trite law that the failure to endorse on the register document of title was fatal. Therefore this again showed that there were serious
- D bona fide issues for the High Court to consider (see paras 103–104); *Pow Hing & Anor v Registrar of Titles, Malacca* [1981] 1 MLJ 155 followed.
- (4) The issue of whether there was negligence on the part of the appellant for not entering the respondent's land for the last ten years and nine months after issuing the notice under s 11(2) of the Act and whether the doctrine of estoppel could be correctly invoked against the appellant in these circumstances were substantive observations for the High Court to consider and not be considered in an interlocutory application. However, at this juncture it was suffice to say that the
- E totality of the facts disclosed yet another bona fide serious issue to be tried (see paras 59–61).
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- (5) Although the provision of electricity by the appellant is definitely a public purpose activity, this public purpose is not intended to grant blanket immunity to all licensees under the Act. The public purpose factor is intended to literally put the interest of the public above other considerations. At this point it was therefore necessary to consider if 'public purpose' could be used as a shield by the appellant to avoid the consequences of failing to comply with an important provision of the Act ie s 11(10) of the Act. At the same time it is necessary to bear in mind that non-compliance with s 11(10) of the Act defeats the conclusiveness of the register document of title. The fact remains that the National Land Code is based on the Torrens system of conclusiveness of the register document of title. Therefore the
- G respondent who had purchased the land from an auction held in the Malacca High Court and not from the previous registered proprietor and who was on the balance of probabilities a bona fide purchaser for value of the lands was entitled to presume that there was no error in the register document of title. In addition, the appellant's failure to comply
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with s 11(10) of the Act had nothing to do with the public purpose of providing electricity. Thus, based on the facts, it was only fair and reasonable to conclude that a licensee under the Act, such as the appellant, was entitled to invoke public purpose only when it concerned their public purpose function of supplying electricity. Otherwise it would be tantamount to granting the appellant absolute immunity to ignore the provisions of the Act, which had been carefully drafted to protect the interests of the public (see paras 62–68).

- (6) On the issue of adequacy of damages it was held that the justice of the case took precedence and where there was any doubt as to the adequacy of the remedy of damages, it was incumbent upon the court to regard damages as an inadequate remedy and move on to consider the question of the balance of convenience and thereafter take whichever course that appears to carry the lower risk of injustice. The respondent in the present case being an innocent purchaser who relied on a search of the register document of title to purchase the lands from a public auction could not have known of the notice under s 11(2) of the Act issued by the appellant some 10 years and 9 months earlier. In addition there was further evidence that it was not impossible for the appellant to re-align the proposed transmission line but for the costs. Although no ruling regarding any re-alignment of the transmission line could be made in this application, this factor was relevant in considering where the justice of the case lies and whether the status quo should be preserved while awaiting the substantive judgment to be made by the High Court. For such reasons, it was decided that the exercise of the discretion by the High Court judge ought not to be disturbed and the interlocutory injunction should therefore be maintained (see paras 87– 88); *Alor Janggis Soon Seng Trading Sdn Bhd & Ors v Sey Hoe Sdn Bhd & Ors* [1995] 1 MLJ 241 followed.

Per incuriam: A judge takes judicial notice when he or she accepts the truth of a certain matter without requiring proof. The doctrine of judicial notice allows judges to ‘notice’ information that would not otherwise come before the court thereby expanding the background against which the judgments of the judges are made (paras 90–91).

[Bahasa Malaysia summary]

Perayu adalah syarikat senarai awam yang diberikan lesen untuk membekalkan tenaga elektrik di bawah Akta Bekalan Elektrik 1990 (‘Akta tersebut’). Untuk menjalankan perniagaan pembekalan elektrik perayu mempunyai kuasa untuk memasuki tanah persendirian untuk membina pilon untuk talian pengaliran elektrik dengan syarat ia mematuhi dengan tegas keperluan-keperluan Akta tersebut. Secara alternatif perayu mempunyai kuasa untuk memilih untuk memperoleh tanah tersebut, di atas mana ia

- A ingin membina pylon, secara tetap dengan menggunakan Akta Pengambilan Tanah 1960 ('APT'). Responden membeli enam bidang lot tanah semasa lelongan awam yang diadakan di Mahkamah Tinggi Melaka. Menurut responden daftar hak milik untuk keenam-enam lot tersebut menunjukkan tiada pengendorsan langsung mengenai apa-apa hak untuk masuk oleh
- B perayu. Selanjutnya, seorang pengarah syarikat responden memberikan keterangan affidavit bahawa carian hak milik tanah yang dilakukan sebelum lelongan menunjukkan bahawa terdapat pengendorsan pengambilan tanah berkaitan dengan tiga daripada enam lot tanah tersebut tetapi selepas pertanyaan ia diketahui bahawa ia adalah pengambilan kecil untuk tujuan
- C melebarkan jalan. Apabila responden kemudiannya membuat pelan untuk menukar keenam-enam lot tanah kepada kawasan perumahan mereka membuat pertanyaan di pejabat perayu mengenai bekalan elektrik masa hadapan ke kawasan perumahan yang baru tersebut. Perayu kemudian mendedahkan pelan mereka untuk membina pylon elektrik menyeberangi
- D tiga daripada enam lot-lot tanah (tanah-tanah tersebut) yang dibeli oleh responden. Hanya pada ketika itu responden mengetahui bahawa perayu telah mengeluarkan notis di bawah s 11(2) Akta kepada pemilik terdahulu tanah-tanah tersebut dan oleh itu memiliki hak lalu lalang atas tanah-tanah tersebut dan adalah disebabkan oleh hak ini, pemegang lesen tanah-tanah
- E tersebut. Melalui penemuan ini, responden memohon ke Mahkamah Tinggi, antara lain, deklarasi yang akan mempunyai kesan membatalkan apa-apa hak yang perayu ada untuk memasuki tanah-tanah tersebut. Pada masa yang sama responden memohon untuk injunksi interlokutori untuk mengekalkan status quo sementara pemutusan tuntutan substantif responden dan/atau apa-apa
- F arahan atau perintah dikeluarkan kepada perayu oleh Pihak Berkuasa Negeri Melaka. Tuntutan substantif responden terhadap perayu tertumpu kepada kegagalan perayu untuk mematuhi s 11(10) Akta tersebut. Responden menyebut bahawa di bawah s 11(4) Akta tersebut jika pemilik atau penghuni tanah tersebut memilih untuk membantah notis s 11(2) maka bantahan
- G tersebut boleh dibuat kepada Pentadbir Tanah Daerah sama ada secara lisan atau bertulis. Oleh kerana bantahan boleh dibuat oleh pemilik secara lisan, ia menjadi perlu untuk perayu pemegang lesen untuk mematuhi s 11(10) Akta tersebut iaitu memperoleh kenyataan bertulis daripada Pentadbir Tanah Daerah menyatakan bahawa tidak ada bantahan yang telah dibuat oleh
- H pemilik atau penghuni. Pendirian perayu di Mahkamah Tinggi adalah bahawa mereka mempunyai hak mutlak untuk memasuki tanah responden dan bahawa keputusan carian adalah, pada pendapat mereka tidak berguna. Mahkamah Tinggi selepas membaca dan memeriksa keseluruhan s 11 Akta tersebut, dan secara khusus s 11(10) Akta tersebut membenarkan injunksi
- I interlokutori tersebut. Dalam rayuan ini terhadap keputusan tersebut, perayu menghujah bahawa hakim Mahkamah Tinggi terkhilaf dalam menangani s 11(10) Akta tersebut dengan panjang lebar dan bahawa, walau bagaimanapun, tugas perayu untuk mematuhi s 11(10) adalah secara arahan dan bukan mandatori. Perayu juga disalahkan oleh hakim Mahkamah Tinggi

kerana gagal untuk mempertimbangkan s 11(5) Akta tersebut yang didakwa mewujudkan hak untuk masuk secara berterusan kepada perayu. Tambahan, perayu menghujah secara lisan dan juga dalam penghujahan bertulisnya bahawa sebagai 'public authority' ia sepatutnya diberi perhatian oleh mahkamah.

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Diputuskan, menolak rayuan dengan kos:

- (1) Identiti pihak-pihak, bagaimanapun, bukan suatu faktor yang akan mempengaruhi mahkamah dalam proses membuat keputusan. Penghakiman akan diberikan menurut fakta-fakta dan undang-undang dan bukan dipengaruhi oleh sama ada perayu adalah kerajaan atau syarikat yang mempunyai hubungan dengan kerajaan. Pendek kata ia adalah undang-undang dan keadilan kes yang penting (lihat perenggan 18–20).
- (2) Jika hakim Mahkamah Tinggi tidak sepatutnya mempertimbangkan dan mentafsir s 11(10) Akta tersebut, bagaimana beliau boleh mempertimbangkan dan mentafsir s 11(5) Akta tersebut secara berasingan. Seksyen 11(5) Akta tersebut mesti dilihat dalam perspektif yang betul kerana secara sendirinya ia tidak mewujudkan sebarang hak untuk masuk kepada perayu. Seksyen 11 dan sepuluh subseksyennya adalah dibuat secara perundangan untuk memberikan satu mekanisme untuk pemegang lesen di bawah Akta tersebut memperoleh hak untuk memasuki tanah untuk membina pilon-pilon elektrik dan memasang kabel elektrik, untuk melindungi hak-hak pemilik dan penghuni tanah yang terjejas oleh hak untuk masuk dan untuk memastikan bahawa pengendorsan daftar dokumen hak milik tanah yang terjejas dengan memberikan notis kepada sesiapa yang membuat carian hak milik pada masa hadapan. Walaupun proses bermula dengan pemegang lesen mengeluarkan notis di bawah s 11(2) Akta tersebut kepada pemilik atau penghuni, untuk notis di bawah s 11(2) Akta tersebut mewujudkan sebarang hak untuk masuk di bawah s 11(5) Akta tersebut, pemegang lesen perlu terlebih dahulu memperoleh kenyataan daripada Pentadbir Tanah Daerah menyatakan bahawa tidak ada bantahan yang buat oleh pemilik atau penghuni. Jika ada apa-apa bantahan dibuat oleh pemilik atau penghuni tanah-tanah tersebut, s 11(5) Akta tersebut adalah batal secara keseluruhannya walaupun jika terdapat bantahan lisan yang dibuat oleh penghuni. Oleh itu Mahkamah Tinggi telah melaksanakan bidang kuasanya secara perundangan dalam membuat penemuan bahawa responden mempunyai isu bona fide yang serius untuk dibicarakan mengenai sama ada pemegang lesen boleh dikatakan memperoleh hak-hak di bawah s 11(5) Akta tersebut tanpa mematuhi s 11(10) (lihat perenggan 40–44 & 57).

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- A (3) Ia adalah undang-undang mantap bahawa kegagalan untuk membuat pengendorsan ke atas daftar dokumen hak milik adalah menjejaskan. Oleh yang demikian, ini sekali lagi menunjukkan bahawa terdapat isu-isu bona fide yang serius untuk pertimbangan Mahkamah Tinggi (lihat perenggan 103–104); *Pow Hing & Anor v Registrar of Titles, Malacca* [1981] 1 MLJ 155 diikuti.
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- C (4) Isu sama ada terdapat kecuaiian pada pihak perayu kerana tidak memasuki tanah responden dalam jangka masa sepuluh tahun dan sembilan bulan selepas mengeluarkan notis di bawah s 11(2) Akta tersebut dan sama ada doktrin estoppel boleh dibangkitkan dengan betul terhadap perayu di dalam keadaan ini adalah pemerhatian substantif untuk pertimbangan Mahkamah Tinggi dan tidak dipertimbangkan dalam permohonan interlokutori. Walau bagaimanapun, pada ketika ini, adalah cukup untuk menyatakan bahawa keseluruhan fakta-fakta mendedahkan, satu lagi isu bona fide yang serius perlu dibicarakan (lihat perenggan 59–61).
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- E (5) Walaupun peruntukan elektrik oleh perayu adalah sememangnya aktiviti untuk tujuan umum, tujuan umum tersebut tidak diniatkan untuk memberikan perlindungan kepada kesemua pemegang lesen di bawah Akta tersebut. Faktor tujuan umum adalah diniatkan secara literal meletakkan kepentingan awam mengatasi pertimbangan-pertimbangan lain. Pada tahap ini, ia adalah oleh itu perlu untuk mempertimbangkan jika ‘public purpose’ boleh digunakan sebagai pelindung oleh perayu untuk mengelakkan akibat dari kegagalan mematuhi peruntukan penting Akta tersebut iaitu s 11(10) Akta tersebut. Pada masa yang sama ia adalah perlu untuk diingat bahawa ketidakpatuhan dengan s 11(10) Akta tersebut menggagalkan daftar dokumen hak milik yang konklusif. Fakta tetap bahawa Kanun Tanah Negara adalah berasaskan sistem Torrens mengenai konklusifnya daftar dokumen hak milik. Oleh itu responden yang telah membeli tanah dari lelongan yang diadakan di Mahkamah Tinggi Melaka dan bukan daripada pemilik berdaftar sebelum ini dan yang adalah atasimbangan kebarangkalian adalah pembeli bona fide untuk nilai tanah-tanah tersebut adalah berhak untuk menganggap bahawa tidak terdapat kesilapan di dalam daftar dokumen hak milik. Tambahan,
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- kegagalan perayu untuk mematuhi s 11(10) Akta tersebut tidak ada apa-apa kaitan dengan tujuan umum membekalkan elektrik. Oleh itu, berdasarkan kepada fakta, ia adalah adil dan munasabah untuk menyimpulkan bahawa pemegang lesen di bawah Akta, seperti perayu, adalah berhak untuk membangkitkan tujuan awam hanya bila ia melibatkan fungsi tujuan umumnya untuk membekalkan elektrik. Jika tidak ia akan bermaksud memberikan perayu perlindungan mutlak untuk tidak mengendahkan peruntukan Akta tersebut, yang telah dibuat secara teliti untuk melindungi kepentingan awam (lihat perenggan 62–68).

- (6) Berkenaan isu kecukupan ganti rugi, ia adalah diputuskan bahawa keadilan kes adalah mengatasi dan di mana terdapat keraguan mengenai kecukupan remedi ganti rugi, ia adalah kewajipan mahkamah untuk menganggap ganti rugi sebagai remedi yang tidak mencukupi dan meneruskan untuk mempertimbangkan persoalan imbalan kesenangan dan kemudian mengambil apa-apa tindakan yang jelas meringankan risiko ketidakadilan. Responden di dalam kes ini sebagai pembeli yang tidak bersalah yang bersandar atas carian daftar dokumen hak milik untuk membeli tanah-tanah tersebut semasa lelongan awam tidak mungkin mengetahui notis di bawah s 11(2) Akta tersebut yang dikeluarkan oleh perayu dalam 10 tahun dan 9 bulan yang lalu. Tambahan, tidak terdapat keterangan lanjut bahawa ia bukan mustahil untuk perayu untuk menjajarkan semula talian pengaliran tetapi melibatkan kos. Walaupun tidak ada arahan berkenaan penjajaran semula talian pengaliran boleh dibuat di dalam permohonan ini, faktor ini adalah relevan dalam mempertimbangkan di mana keadilan kes terletak dan sama ada status quo perlu dipelihara sementara menunggu penghakiman substantif dibuat oleh hakim Mahkamah Tinggi. Untuk alasan-alasan yang sedemikian, ia adalah diputuskan bahawa pelaksanaan budi bicara oleh hakim Mahkamah Tinggi tidak boleh diganggu dan injunksi interlocutori oleh itu harus dipelihara (lihat perenggan 87–88); keputusan dalam *Alor Janggus Soon Seng Trading Sdn Bhd & Ors v Sey Hoe Sdn Bhd & Ors* [1995] 1 MLJ 241 diikuti.

Per incuriam: Seseorang hakim mengambil notis kehakiman apabila beliau menerima kebenaran sesuatu perkara tanpa memerlukan bukti. Doktrin notis kehakiman membenarkan hakim-hakim untuk 'notice' maklumat yang sebaliknya tidak mungkin didapati di mahkamah dan oleh itu meluaskan latar belakang terhadap mana penghakiman hakim-hakim dibuat (lihat perenggan 90–91).]

Notes

For cases on interlocutory injunction, see 2(1) *Mallal's Digest*, paras 3224–3348.

Cases referred to

- Actien-Gesellschaft for Cartonnagen Industrie AG v Temler* (1899) vol XVI RPC 447 (refd)
Allen & Ors v Jambo Holdings Ltd & Ors [1980] 1 WLR 1252 (refd)
Alor Janggus Soon Seng Trading Sdn Bhd & Ors v Sey Hoe Sdn Bhd & Ors [1995] 1 MLJ 241 (folld)
American Cyanamid Co v Ethicon Ltd [1975] AC 396; [1975] 1 All ER 504; [1975] 2 WLR 316 (refd)
Beese & Ors v Woodhouse A & Ors [1970] 1 WLR 586 (refd)

- A** *Boustead Trading [1985] Sdn Bhd v Arab-Malaysian Merchant Bank Bhd* [1995] 3 MLJ 331 (refd)
Bovill v Crate LR 1 Eq 388 (refd)
Brandao v Barnett (1846) 12 CI & Fin 787 (refd)
Cekal Berjasa Sdn Bhd v Tenaga Nasional Bhd [2006] 4 MLJ 284 (folld)
- B** *Commonwealth Shipping Representative v Peninsular and Oriental Branch Service* [1923] AC 191 (refd)
Crosley v The Derby Gas-Light Company (January, November 7, (1838) English Reports 40, 3 M & C 429; 4 LJ (NS) Ch 25; 41 RR 198 (refd)
Dato Menteri Othman bin Baginda & Anor v Dato Ombi Syed Alwi bin Syed Idrus [1981] 1 MLJ 29 (refd)
- C** *Davey v Harrow Corp* [1958] 1 QB 60 (refd)
Dunlop Pneumatic Co Ltd and The Pneumatic Tyre Company, Ltd, The v TH Stone and H Corser (1897) vol XIV RPC 962 (refd)
Edison Bell Phonograph Corp Ltd, The v Hough (1894) vol XI RPC 594 (refd)
- D** *Fine Foods Inc v Dahlin* [1986] 523 A 2d 1228 (refd)
Freeman v Cooke [1848] 2 Exch 654 (refd)
Gillette Safety Razor Co v AW Gamage Ltd (1907) 24 RPC 1 (refd)
Gillette Safety Razor Co & Anor v Diamond Edge Ltd (1926) 43 RPC 310 (refd)
- E** *Greer v The Bristol Tanning Company* (1885) vol II – Nos 1 to 20 RPC 268 (refd)
Hanson v Radcliffe Urban District Council [1922] 2 Ch 490 (refd)
Keet Gerald Francis Noel John v Mohd Noor bin Abdullah & Ors [1995] 1 MLJ 193 (folld)
- F** *King v Luffe, The* [1807] 8 East 193 (refd)
Leonhardt & Coy v Kalle & Coy (1894) 11 RPC 534 (refd)
Lethia M Coover v DE Davenport [1870] 48 Tenn 368; WL 2672 (Tenn) 7 (refd)
Lim Cho Hock v Speaker, Perak State Legislative Assembly [1979] 2 MLJ 85 (refd)
- G** *Malaysia Building Society Bhd v Univein Sdn Bhd* [2003] 5 MLJ 394 (refd)
Moorgate Mercantile Co Ltd v Twitchings [1976] 1 QB 225; [1975] 3 All ER 314 (refd)
Munro v Wivenhoe and Brightlingsea Rly Co (1865) 4 DE GJ & S 723 ; 46 ER 1100 (refd)
- H** *Ng Yit Seng & Anor v Syarikat Jiwa Mentakab Sdn Bhd & Ors* [1981] 2 MLJ 194 (refd)
North British Rubber Co Ltd v Gormully & Jeffery Manufacturing Co (1895) vol XII RPC 17 (refd)
- I** *Pacol Ltd & Ors v Trade Lines Ltd and R/I Sif IV ('The Henrik Sif')* [1982] Vol 1 Lloyd's Law Reports 456 (refd)
Patterson v Van Wiel [1977] 570 P 2d 931 (refd)
Pemungut Hasil Tanah, Daerah Barat Daya, Pulau Pinang v Ong Gaik Kee [1983] 2 MLJ 35 (refd)

- Plimpton v Spiller* (1876) 4 Ch D 286 (refd) A
Pow Hing & Anor v Registrar of Titles, Malacca [1981] 1 MLJ 155 (folld)
Renard v Levinstein (January 26, 27, 1865) English Reports, volume LXXI
 (71) (refd)
S Kulasingam & Anor v Commissioner of Lands, Federal Territory & Ors [1982]
 1 MLJ 204 (refd) B
*Siskina (Owners of Cargo Lately Laden on Board) & Ors, The v Distos
 Compania Naviera SA* [1979] AC 210 (refd)
Sublette Exchange Bank, Appellee, v Martin J Fitzgerald, Appellant, et al 168 III
 App 240 [1912] WL 2020 III App 2 Dist (refd)
Pembangunan Maha Murni Sdn Bhd v Jururus Ladang Sdn Bhd [1986] 2 MLJ C
 30 (refd)
Tan Sri Haji Othman Saat v Mohamed bin Ismail [1982] 2 MLJ 177 (refd)
Tenaga Nasional Bhd v Dolomite Industrial Park Sdn Bhd [2000] 2 MLJ 133
 (refd)
Tenaga Nasional Bhd v Perwaja Steel Sdn Bhd [1995] 4 MLJ 673 (refd) D
Tenaga Nasional Bhd v Tekali Prospecting Sdn Bhd [2002] 2 MLJ 707 (refd)
Teobros Development Sdn Bhd v Tenaga Nasional Bhd [2007] 7 MLJ 67 (refd)
United Telephone Co v Equitable Telephone Association (1888) vol V Nos 1 to
 23 RPC 233 (refd)
*Welsbach Incandescent Gas Light Company, Ltd v General Incandescent
 Company, Ltd* (1901) vol XVIII RPC 533 (refd) E

Legislation referred to

- Courts of Judicature Act 1964 s 72
 Electricity Act 1949 ss 13, 14, 56(1) F
 Electricity Supply Act 1990 ss 2, 9, 11, 11(2), 11(4), 11(5), 11(6), 11(7),
 11(8), 11(10), 14, 14(2)(a)
 Evidence Act 1950 ss 56, 57
 Land Acquisition Act 1960
 National Land Code ss 97, 97(2) G
 Penal Code
 Pengurusan Danaharta Nasional Act 1998 s 72
 Public Authorities Protection Ordinance 1948
 Rules of the High Court 1980 O 15 r 16
 Specific Relief Act 1950 s 41
*Cyrus Das (Azlan Sulaiman, Shamsul Bahrin & Mahir Juhari with him) (Azmi
 & Associates) for the appellant.* H
Gan Techiong (Gan & Lim) for the respondent.

Abdul Malik Ishak JCA (delivering judgment of the court):

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INTRODUCTION

[1] The appellant was the defendant in the High Court below. Their appeal

A before us was against the decision of the High Court judge at Malacca who issued an interlocutory injunction restraining the appellant from entering the respondent's (the plaintiff in the High Court below) land until further order.

B [2] The judgment of the High Court judge has since been reported in the local law journal vide *Teobros Development Sdn Bhd v Tenaga Nasional Bhd* [2007] 7 MLJ 67.

C [3] Now, as the subject matter of the appeal centred on the interlocutory injunction, we need only apply the guidelines of this court in *Keet Gerald Francis Noel John v Mohd Noor bin Abdullah & Ors* [1995] 1 MLJ 193 (hereinafter referred to as '*Keet Gerald*') in order to decide whether the High Court judge had exercised his discretion judiciously.

D LEGAL SEMANTICS

E [4] It is now trite law that an applicant who seeks an interlocutory injunction must apply to the court without delay. Persons who assert legal rights are bound to come promptly, and, a fortiori, persons who only assert equitable rights (*Leonhardt & Coy v Kalle & Coy* (1894) Vol XI RPC (Reports of Patent, Design, and Trade Mark Cases) 534; *North British Rubber Co Ltd v Gormully & Jeffery Manufacturing Co* (1895) Vol XII RPC (Reports of Patent, Design, and Trade Mark Cases) 17; *Actien-Gesellschaft for Cartonnagen Industrie AG v Temler* (1899) Vol XVI RPC (Reports of Patent, Design, and Trade Mark Cases) 447; and *Gillette Safety Razor Co v AW Gamage Limited* (1907) Vol XXIV RPC (Reports of Patent, Design, and Trade Mark Cases) 1).

G [5] The delay which is considered fatal is the delay after knowing the infringement. An ignorant applicant is excused from the consequences of delay (*Crosley v The Derby Gas-Light Company* (January, November 7, (1838) English Reports 40, 3 M & C 429, p 436; 4 LJ (NS) Ch 25; 41 RR 198). Of course, it is not possible to stipulate the exact amount of the delay that may be considered as fatal. It must surely depend upon the circumstances of each case. Thus, nine months (*Bovill v Crate* LR 1 Eq 388), six months (*The Edison Bell Phonograph Corporation, Ltd v Hough* (1894) Vol XI RPC (Reports of Patent, Design, and Trade Mark Cases) 594), three months (*The Dunlop Pneumatic Tyre Co Ltd and The Pneumatic Tyre Co Ltd v TH Stone and H Corser* (1897) Vol XIV RPC (Reports of Patent, Design, and Trade Mark Cases) 962), and even three weeks (*Greer v The Bristol Tanning Company* (1885) Vol II – Nos 1 to 20 RPC (Reports of Patent Cases) 268) have been held by the courts to be sufficient to disentitle the applicants to interlocutory reliefs. But, if the delays are explained (*United Telephone Co v Equitable Telephone Association* (1888) Vol V Nos 1 to 23 RPC (Reports of Patent,

Design, and Trade Mark Cases) 233; *Welsbach Incandescent Gas Light Company, Ltd v General Incandescent Company, Ltd* (1901) Vol XVIII RPC (Reports of Patent, Design, Trade Mark, and Other Cases) 533; and *Gillette Safety Razor Co & Anor v Diamond Edge Ltd* (1926) 43 RPC (Reports of Patent, Design, Trade Mark, and Other Cases) 310), the applicant would be entitled to the relief. At the end of the day, the justice of the case is of paramount importance. Here, there was no delay on the part of the respondent in applying for an interlocutory injunction before the High Court judge at Malacca.

[6] Essentially, the object of the court in granting an interlocutory injunction is to prevent mischief and to keep things in status quo until the hearing is completed (*Plimpton v Spiller* (1876) 4 Ch D 286). It is the practice of the court, when an interlocutory injunction is granted, to require the applicant to give an undertaking to abide by any order that the court may make in the opponent's favour for damages. Such a requirement is also imposed notwithstanding that the case for an interlocutory injunction is clearly made out (*Renard v Levinstein* (January 26, 27, 1865) English Reports, volume LXXI (71); Vice-Chancellor's Court XVI p 607, Hemming & Miller, Vols 1 and 2; Holt, Equity Reports, volumes 1 and 2 para 628). In short, the practice of requiring the applicant to undertake to pay any damages subsequently found due to the opponent as compensation if the injunction cannot be justified at the trial has been entrenched and adopted in almost every case.

[7] In a proper case, the court will not deprive the applicant, with limited financial resources, the right to an injunction (*Allen & Ors v Jambo Holdings Ltd & Ors* [1980] 1 WLR 1252). In most cases where the applicant refuses to give an undertaking as to damages, he is unlikely to obtain an interlocutory injunction.

[8] It must be borne in mind that the hearing of an application for an interlocutory injunction is not a trial on the merits. At that stage, there will be no oral evidence nor an opportunity for cross-examination.

THE FACTS

[9] Under this head, I need only to refer to the judgment of the High Court judge. Briefly stated, he pointed out that the appellant is a public listed company licensed under the Electricity Supply Act 1990 (Act 447) (hereinafter referred to as the 'said Act') to carry out the business of supplying electricity in Malaysia and has a right to enter private land to erect pylons for their electricity transmission lines provided that they comply strictly with the requirements of the said Act or alternatively the appellant may choose to

- A acquire the land permanently by resorting to the Land Acquisition Act 1960 (Act 486) (Revised 1992). He sets out further the salient facts that the respondent had purchased six lots of land at a public auction held on 23 April 2007 at the High Court at Malacca and that the register documents of titles of those six lots of land showed no endorsements at all of any right of entry
- B of the appellant. When the respondent's consultants had completed drawing their plans to turn and convert the six lots of land into a housing estate, they made enquiries at the appellant's office about the future supply of electricity for the new housing estate. It was only then that the appellant disclosed their plans to construct electricity pylons across three out of the six lots of land
- C purchased by the respondent, namely, across GRN 20737 Lot No: 987, GRN 20738 Lot No: 988 and GRN 6217 Lot No: 989, Mukim of Sungei Petai, Melaka.
- D [10] From the appellant's perspective, the facts went into the history of what had happened to the three out of the six lots of land that were purchased by the respondent. According to the appellant, the dispute revolved around only the three lots of land purchased by the respondent. The said lands were previously owned by a company known as Green Formation Sdn Bhd as reflected at pp 142–157 of the appeal record Jilid 1 (AR-J1).
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- F [11] On 18 September 1997, the appellant issued the first schedule notices to Geahin Development Sdn Bhd (another previous landowner) under the said Act for purposes of a project known as *Projek talian penghantaran 275/132 kV dari Kelemak Melaka ke Sg Mati Johor* (see pp 176–181 of AR-J1). There was no objection lodged by the previous landowner, namely, Geahin Development Sdn Bhd and, consequently, the district land administrator, on 8 December 1997, gave notices of hearing to determine the compensation payable to the previous landowner (see pp 182–184 of AR-J1).
- G It must be borne in mind that there were two previous owners of the said lands prior to the respondent.
- H [12] Now, the hearing to determine the compensation was held on 18 December 1997 and the appellant was ordered to pay the sum of RM194,110 as compensation to the previous landowner, namely, Green Formation Sdn Bhd (see p 185 of AR-J1). And the compensation was duly paid on 4 September 2002 to Green Formation Sdn Bhd (see pp 187–192 of AR-J1).
- I [13] The respondent then came into the picture when the respondent purchased the said lands via public auction on or about 23 April 2007. According to the appellant, the respondent must be considered as having stepped into the shoes of the previous land owner who was duly paid for the way-leave right acquired by the appellant.

[14] Only later that the respondent discovered that the appellant possessed a way-leave right over the said lands. The respondent then obtained an interlocutory injunction from the Malacca High Court restraining the appellant from entering and performing any work on the said lands.

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[15] The respondent's substantive claim at the High Court is for, inter alia, declarations which would have the effect of annulling whatever rights the appellant had to enter the three lots of land. The interlocutory injunction, on the other hand, was intended to preserve the status quo pending the final disposal of the respondent's substantive claim and/or some directions or orders to be issued to the appellant by the State Authority of Malacca.

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[16] It was the courts of equity in England that developed the remedy of declaration. Eventually, it was adopted by the common law courts. A declaration declares the legal rights of the parties. Raja Azlan Shah, Acting Lord President (as His Royal Highness then was) in *Dato Menteri Othman bin Baginda & Anor v Dato Ombi Syed Alwi bin Syed Idrus* [1981] 1 MLJ 29, p 31, aptly states that the remedy of declaration can be used in a *wide range of circumstances* and in a *wide variety of cases in terms of subject matter*. And it must be for these reasons that the respondent sought those declarations. Our s 41 of the Specific Relief Act 1950 (Act 137) makes provisions for a declaratory decree. It stipulates that any person entitled to any *legal character*, or to any *right as to any property*, may institute a suit against any person denying, or interested to deny, his title to the *character* or *right*. Under s 41 of the Specific Relief Act 1950 (Act 137), a declaration will be sought by the applicant in order to protect the applicant's entitlement to a legal character or status or right to property. Whereas under O 15 r 16 of the Rules of the High Court 1980 ('RHC'), in order to succeed the plaintiff needs only to establish that his legal interests are peculiarly affected (*Tan Sri Haji Othman Saat v Mohamed bin Ismail* [1982] 2 MLJ 177; and *Lim Cho Hock v Speaker, Perak State Legislative Assembly* [1979] 2 MLJ 85). In *Hanson v Radcliffe Urban District Council* [1922] 2 Ch 490, Lord Sterndale MR categorically said at p 507 that:

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... the power of the court to make a declaration, ... is almost unlimited; I might say only limited by its own discretion.

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OBSERVATIONS

[17] There is a preliminary point which ought to be put to rest. It is this. That learned counsel for the appellant had submitted both orally and in his written submission that the appellant is a *public authority* and tried to impress us to regard the appellant favourably in that direction. On the other side of the aisle, learned counsel for the respondent was at pains to draw our

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- A attention to excerpts of the appellant's annual report exhibited in the respondent's affidavit. His purpose was merely to point out that the appellant is in fact a highly profitable public-listed company with a net profit of RM4.1b in the year 2007 which the appellant disclosed in its annual report.
- B [18] We must categorically state that the identity of the parties in any case per se is not a factor that will influence this court in our decision making process. Otherwise it would be tantamount to the court being partial.
- C [19] We will render our judgments according to the facts and the law. We will continue to do so until we retire.
- D [20] We are not influenced by whether the appellant is the government or a government linked company. Neither are we influenced by the net profit of the appellant's company. To put it bluntly, it is the law and the justice of the case that matter to us. Nothing else.

JUDICIAL NOTICE

- E [21] We would scrutinise all the averments in the affidavits filed by the parties herein and where necessary shall take judicial notice of relevant matters.
- F [22] *Black's Law Dictionary*, 7th Ed 1999 at p 851 defines *judicial notice* as *a court's acceptance, for purposes of convenience and without requiring a party's proof, of a well-known and indisputable fact*. Section 56 of the Evidence Act 1950 (Act 56) enacts as follows:
- Fact judicially noticeable need not be proved
- G 56 No fact of which the court will take judicial notice need be proved.
- H [23] According to the case of *Brandao v Barnett* (1846) 12 CI & Fin 787, in civil proceedings, matters of which judicial notice may be taken need not be pleaded. And according to Lord Sumner in *Commonwealth Shipping Representative v Peninsular And Oriental Branch Service* [1923] AC 191 HL at p 212:
- I Judicial notice refers to facts, which a judge can be called upon to receive and to act upon, either from his general knowledge of them, or from inquiries to be made by himself for his own information from sources to which it is proper for him to refer.

[24] It is said that through judicial notice, a judge accepts an adjudicative fact (see *John W Strong, McCormick on Evidence*, 328 at 491) or a legislative fact without requiring proof. This is usually done for purposes of convenience. The court would certainly take judicial notice of a fact where it is desirable that the evidence in relation to it should not be called. This principle would usually be applied where a particular fact *is so notorious* that to require evidence to prove it would be an inconvenient as well as an unnecessary waste of time and resources. Facts may be judicially noticed where 'no person can raise a question' as to their truth (*The King v Luffe* [1807] 8 East 193 at p 207). Thus, judicial notice can be taken of the fact that two weeks is too short a gestation period for human beings. Judicial notice too will be taken of geographical matters. For instance, that the universal practice of the Ordinance Survey Office of representing the centre of a hedge by a line on a map should be acceptable and this is reflected in the case of *Davey v Harrow Corp* [1958] 1 QB 60. In *Lethia M Coover v DE Davenport* [1870] 48 Tenn 368; WL 2672 (Tenn) 7, the court took judicial notice of divisions of counties in Tennessee. In *Sublette Exchange Bank, Appellee, v Martin J Fitzgerald, Appellant, et al* 168 III App 240 [1912] WL 2020 (III App 2 Dist), it was held that *the court will take judicial notice of the geographical features of this and other states and countries, so far as the same may be fairly presumed to be within the general knowledge of persons of ordinary intelligence living here*. In *Patterson v Van Wiel* [1977] 570 P 2d 931, p 936 (NM App 1977), the court held that *common knowledge includes matters of learning, experience, history, and facts of which judicial notice may be taken*.

[25] Geographical location of relevant places and the distance between them are among the things that the court may take judicial notice of. And the court too may take judicial notice of locations shown in a government issued map (*Malaysia Building Society Bhd v Univein Sdn Bhd* [2003] 5 MLJ 394). Section 57 of the Evidence Act 1950 (Act 56) is not exhaustive and it *does not prohibit the courts from taking judicial notice of other facts not mentioned therein* (per Syed Agil Barakbah SCJ in *Pembangunan Maha Murni Sdn Bhd v Jururus Ladang Sdn Bhd* [1986] 2 MLJ 30 at p 32). In America, in the case of *Fine Foods Inc v Dahlin* [1986] 523 A 2d 1228, p 1231 (Vt 1986), the court held that, *The distance from the Old Newfane Inn to plaintiffs' restaurant in Brattleboro is a fact which the trial court could accurately determine from unquestionable sources, and, thus, judicial notices was within its discretion*.

[26] *John W Strong, McCormick on Evidence*, (5th Ed 1999) at p 496 stated that *after a number of courts take judicial notice of a principle, subsequent courts begin to dispense with the production of these materials and to take judicial notice of the principle as a matter of law established by precedent*. In Malaysia, it is known to the members of the public that accurate maps of the states within Malaysia issued by the National Mapping Directorate are openly available for

A sale to the public at the Pejabat Jabatan Ukur Dan Pemetaan, that is, the office of the Survey And Mapping Department. Starting a cue, I now take judicial notice of the availability of the accurate maps of the states within Malaysia to the members of the public and before me is an accurate map of Malacca entitled *Semenanjung Malaysia, Melaka*.

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[27] Now, according to the appellant's affidavit affirmed by Nor Rusman bin Mohd Nor on 4 July 2007 as reflected at pp 116 – 125 of AR-J1, the appellant had intended since the year 1997 to perform a project known as
C *Projek talian penghantaran 275/132 kV dari Kelemak, Melaka ke Sg Mati, Johor*. A notice under s 11(2) of the said Act was apparently issued some ten (10) years nine (9) months ago on 16 September 1997 (calculated from the date of this judgment (16 June 2008) to 16 September 1997). The appellant's affidavit in reply affirmed by Samat bin Ayob on 28 December 2007 as seen
D in encl 23 which was admitted as further evidence disclosed that this electricity line was planned to be 70km long and involved the construction of 203 electricity towers. We are in a position to take judicial notice that
E *Sg Mati* is closer to Muar in the State of Johor while Kelemak is in the middle of the State of Melaka. It is also appropriate to take judicial notice that
F *Sg Petai*, where the respondent's three (3) lots of land are located, *is about 3km from Kelemak in Melaka* where the end of the proposed transmission line is planned to be located. This means that the length of the line from the respondent's land in *Sg Petai, Melaka* to the other end of the proposed transmission line in *Sg Mati, Johor* would be about 67km – based entirely on the calculation of 70km minus 3km.

THE PRINCIPLES IN KEET GERALD

G [28] This court in *Keet Gerald* has set out the principles for a High Court judge to follow when hearing an application for an interlocutory injunction, namely (see pp 206 – 207 of the MLJ report):

H (1) he must ask himself whether the totality of the facts presented before him discloses a bona fide serious issue to be tried. He must, when considering this question, bear in mind that the pleadings and evidence are incomplete at that stage. Above all, he must refrain from making any determination on the merits of the claim or any defence
I to it. It is sufficient if he identifies with precision the issues raised on the joinder and decides whether these are serious enough to merit a trial. If he finds, upon a consideration of all the relevant material before him, including submissions of counsel, that no serious question is disclosed, that is an end of the matter and the relief is

refused. On the other hand if he does find that there are serious questions to be tried, he should move on to the next step of his inquiry;

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- (2) having found that an issue has been disclosed that requires further investigation, he must consider where the justice of the case lies. In making his assessment, he must take into account all relevant matters, including the practical realities of the case before him. He must weigh the harm that the injunction would produce by its grant against the harm that would result from its refusal. He is entitled to take into account, inter alia, the relative financial standing of the litigants before him. If after weighing all matters, he comes to the conclusion that the plaintiff would suffer greater injustice if relief is withheld, then he would be entitled to grant the injunction especially if he is satisfied that the plaintiff is in a financial position to meet his undertaking in damages. Similarly, if he concludes that the defendant would suffer the greater injustice by the grant of an injunction, he would be entitled to refuse relief. Of course, cases may arise where the injustice to the plaintiff is so manifest that the judge would be entitled to dispense with the usual undertaking as to damages (see *Cheng Hang Guan & Ors v Perumahan Farlim (Penang) Sdn Bhd & Ors* [1988] 3 MLJ 90). Apart from such cases, the judge is entitled to take into account the plaintiff's ability to meet his undertaking in damages should the suit fail, and, in appropriate cases, may require the plaintiff to secure his undertaking, for example, by providing a bank guarantee; and

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- (3) the judge must have in the forefront of his mind that the remedy that he is asked to administer is discretionary, intended to produce a just result for the period between the date of the application and the trial proper and intended to maintain the status quo, an expression explained by Lord Diplock in *Garden Cottage Foods Ltd v Milk Marketing Board* [1983] 3 AC 130; [1983] 2 All ER 770; [1983] 3 WLR 143 and applied in *Cheng Hang Guan*. It is a judicial discretion capable of correction on appeal. Accordingly, the judge would be entitled to take into account all discretionary considerations, such as delay in the making of the application or any adequate alternative remedy that would satisfy the plaintiff's equity, such as an award of monetary compensation in the event that he succeeds in establishing his claim at the trial. Any question going to the public interest may, and in appropriate cases should, be taken into account. A judge should briefly set out in his judgment the several factors that weighed in his mind when arriving at his conclusion.

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- A [29] To paraphrase, firstly, the High Court judge must ask the question of whether the totality of the facts discloses a bona fide serious issue to be tried. Secondly, having found that there are serious bona fide issues to be tried, the High Court judge must next consider where the justice of the case or the balance of convenience lie. Thirdly, the High Court judge must always
- B remember that the remedy that he is asked to administer is entirely discretionary in nature.

- C [30] I will now consider the following issues raised by counsel on both sides, not in its order of merit.

Was the respondent a bona fide purchaser for value?

- D [31] Doubt normally arises as to whether a purchaser is a bona fide purchaser for value if it is suspected that a particular transaction was not at an arm's length transaction or that the purchaser had actual notice of the vendor's lack of title. Here, before us, the respondent was the successful bidder at a public auction held at the Malacca High Court. The significance of this fact is this. That the respondent did not buy from the then registered proprietor but rather bid as a bidder at an auction sale pursuant to an order issued by the High Court of Malaya at Malacca. Learned counsel for the appellant had pointed out to us that the search results exhibited were those done after the auction and not before. We need to see what did the respondent's affidavit depose about the land title searches and the actions
- E taken prior to the auction. Teo Boon Hoo, a director of the respondent's company, affirmed an affidavit on 25 June 2007 as seen at pp 110 – 114 of AR-J1 and in that affidavit he deposed at paras 5, 6, and 7 thereof to the effect that the respondent's representative carried out searches prior to the auction and found only endorsements of land acquisition in respect of Lots
- F 987, 988 and 989 but upon enquiries being made, it was learnt that they were minor acquisitions for the purpose of road widening. In the original Malay language text, this was what Teo Boon Hoo deposed to (see pp 111 – 112 of AR-J1):
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- H 5. Wakil syarikat plaintif telah menjalankan carian di Pejabat Pendaftar Hakmilik Tanah Melaka sebelum tarikh lelongan awam 23 April 2007 dan kami mendapati bahawa surat hakmilik 3 lot dari 6 Lot Tanah tersebut, iaitu surat hakmilik untuk Lot-lot No: 987, 988 dan
- I 989 ada dicatatkan endorsemen pengambilan-balik tanah. Setelah disiasat, saya dapati bahawa endorsement atas surat hakmilik 3 lot tersebut adalah berkaitan pengambilan-balik tanah untuk tujuan melebarkan jalanraya yang dikenali sebagai 'Lebuhraya Melaka-Alor Gajah' dan bukannya dimasukkan atas permohonan defendan.

6. Oleh itu saya telah menghadiri lelongan awam pada 23 April 2007 dan berjaya membeli 6 Lot Tanah tersebut dengan harga RM4,800,000. Sesalinan 'Kontrak Memorandum' yang ditandatangani oleh Timbalan Pendaftar Mahkamah Tinggi Melaka pada 23 April 2007 dieksibit dan ditanda 'TBH-1'. A
7. Pada hari keesokannya, saya telah membuat carian rasmi atas hakmilik 6 Lot Tanah tersebut dan mendapatkan pengesahan bertulis bahawa tiada bebanan lain selain dari endorsmen pengambilan-balik tanah untuk tujuan pelebaran jalanraya tersebut di atas yang melibatkan Lot No: 987, Lot No: 988 dan Lot No: 989 sahaja. Ini bermaksud defendan tiada memasukkan apa-apa nota tentang cadangan untuk memasuki 3 lot tersebut. Sesalinan 6 surat hakmilik untuk 6 Lot Tanah tersebut dieksibit dan ditanda 'TBH-2a', 'TBH-2b', 'TBH-2c', 'TBH-2d', 'TBH-2e' dan 'TBH-2f' masing-masing. B
- [32] There was nothing misleading about Teo Boon Hoo's affidavit because at para 7 thereto he explained that the land title searches were repeated after successfully bidding at the auction and the same were annexed as exhibits and marked as 'TBH-2a' to 'TBH-2f'. C
- [33] In fairness to the appellant, we must also look at the appellant's affidavit in reply that was used at the High Court level. That affidavit in reply was affirmed by Nur Rusman Bin Mohd Nor on 4 July 2007 as seen at pp 116 – 124 of AR-J1. And having read the affidavit in reply of Nur Rusman bin Mohd Nor, I have this to say. All of Teo Boon Hoo's averments about conducting a search prior to the auction and again after the auction were not challenged by Nur Rusman bin Mohd Nor in his affidavit in reply particularly at paras 9 to 16 (see pp 122 – 124 of AR-J1). D
- [34] The appellant probably did not challenge Teo Boon Hoo's averments because the appellant's stand at the High Court was that they had the absolute right to enter the respondent's land and the search results were in their view immaterial. It was submitted that if there had been a challenge at the High Court level then the respondent would have had the opportunity to reply under oath and could have exhibited their pre-auction search results. The learned counsel for the respondent submitted that the first search was in fact conducted on 9 April 2007 and if required by this court, a further affidavit could be filed to specifically prove this point. If this was true that the first search was made two (2) weeks before the auction then it was prudent on the part of the respondent to have conducted a second search after the auction to ensure that nothing new was endorsed on the title during the fortnight. It must be borne in mind that it was most unlikely that any E
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- A purchaser would buy land worth millions of ringgit without any prior land title search. Since it was a fact that there was absolutely nothing on the register document of title about the appellant, the proclamation of sale issued by the High Court auctioneer would not have mentioned anything about the appellant's proposed transmission line and the reserve price would have been fixed based on the valuation which assumed that the register document of title to have been accurate.

- [35] In any event, it is an undisputed fact that the second search conducted immediately after the auction sale did not disclose anything alarming related to the appellant. Thus, on the balance of probabilities, the respondent is a bona fide purchaser for value at the auction held at the Malacca High Court.

The appellant's stand on s 11(10) of the said Act at the High Court hearing

- D [36] *Keet Gerald* is also authority for saying that at the interlocutory stage, the High Court judge should abstain from making any substantive rulings.

- E [37] Learned counsel for the appellant submitted that the High Court judge erred in dealing with s 11(10) of the said Act at length. A perusal of the appeal record at p 103 of AR-J1 shows that the appellant's counsel held the position at the High Court level that it was not the appellant's duty to comply with s 11(10) of the said Act. Now, in the light of the appellant's stand, is it fair to fault the High Court judge for having considered s 11(10) of the said Act at length in his grounds of judgment? In fact, had the High Court judge ignored totally s 11(10) of the said Act, learned counsel for the appellant would now be submitting before us that the High Court judge had failed to consider that section.

- G [38] There can be no doubt, from his grounds of judgment, that the High Court judge was aware that he was handling the case at an interlocutory stage. At p 50 of AR-J1 (the equivalent MLJ reporting would be at p 74), this was what the High Court judge said:

- H In any event, we are at the interlocutory stage and the above facts showed that the plaintiff had raised serious bona fide issues and have satisfied the first test laid down by the Court of Appeal in *Keet Gerald Francis Noel John v Mohd Noor bin Abdullah & Ors* [1995] 1 MLJ 193 in considering applications for interlocutory injunction. The next question is where is the balance of convenience?

- I [39] The respondent's substantive claim, in this case, centred on the appellant's failure to comply with s 11(10) of the said Act. With this backdrop in mind, it was inevitable for the High Court judge and for this panel at this appellate stage to read the whole of s 11 as well as the other

provisions found in the said Act to decide whether there are *bona fide serious issues* to be tried. What the High Court judge held in his grounds of judgment were in fact his observations, based on what he thought was plain and obvious, and not his final rulings on the law. In regard to the High Court judge's observations on s 14 of the said Act, they are quite apparent from the wordings of that section itself. The High Court judge did not finally dispose of the rights of the parties but rather in his grounds of judgment he stated that he was aware that the application before him was of an interlocutory nature.

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The necessity to consider s 11 of the said Act

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[40] Not only did learned counsel for the appellant fault the High Court judge for having considered s 11(10) of the said Act at length, he also faulted the High Court judge for *failing to consider s 11(5) of the said Act*. Now, if the High Court judge was not supposed to consider and construe s 11(10) of the said Act, how could he be expected to consider and construe s 11(5) of the said Act in isolation. Upon re-examining learned counsel's submission, I found that, with respect, he had in fact sought to divert our attention from s 11(10) of the said Act, which his client failed without reason to comply, to s 11(5) of the same Act. Learned counsel for the appellant did not deny that it was the appellant's duty to comply with s 11(10) of the said Act. He merely submitted that it was directory and not mandatory. In his submission he had also attempted to make us presume that s 11(5) of the said Act had created on its own perpetual rights of entry for the appellant when in fact this is one of the serious bona fide issues for the High Court to decide substantively.

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Section 11(5) of the said Act does not on its own create any right of entry

[41] Section 11(5) of the said Act must be viewed in its correct perspective because it does not on its own create any right of entry. This is clear because the ten sub sections in s 11 of the said Act take effect in sequence. They were legislatively enacted to provide a mechanism for a licensee under the said Act to obtain a right to enter land to construct electricity pylons and lay electricity cables and to protect the rights of land owners and occupants who are affected and, last but by no means least, to ensure the endorsement of the register document of title of the affected land by giving notice to those who conduct a title search in the future.

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[42] The process starts with the licensee issuing a notice under s 11(2) of the said Act to the owner or occupier of the land who has the right to object. s 11(4) of the said Act enacts that the objection may be made to the district land administrator within fourteen (14) days of receipt of the notice from the licensee. We must not overlook that s 11(4) of the said Act categorically states

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- A that the objection may be made *either verbally or in writing*. And s 11(5) of the said Act enacts that if no objection is lodged within the fourteen (14) days period then the licensee may forthwith enter on the land while s 11(6) of the said Act enacts that if an objection is lodged, the District Land Administrator shall hold an inquiry giving all the parties an opportunity to be heard.
- B 11(7) of the said Act empowers the district land administrator to make an order either authorising the right of entry for the licensee or prohibiting any entry. The effects of s 11(6) of the said Act read together with s 11(7) of the said Act may be described in this way. That if there is any objection lodged by the owner or occupier of the land, then the notice under s 11(2) of the said
- C Act does not create any right of entry at all. In other words, for a notice under s 11(2) of the said Act to create any right of entry under s 11(5) of the said Act, the licensee must first obtain a statement from the District Land Administrator stating that no objection has been lodged by any of the persons mentioned in sub-s (3) of s 11 of the said Act, that is, the owner or occupier.
- D This requirement of a statement from the District Land Administrator is evident from s 11(10) of the said Act which enacts as follows:

- (10) Notwithstanding any written law relating to land matters, the Registrar —
- E
- (a) upon the production to him of the notice issued by the licensee under subsection (2) together with the statement by the District Land Administrator that no objection had been lodged by any of the persons mentioned in subsection (3); or
- F
- (b) upon the production to him of the original order made under subsection (7) and upon the deposit with him of a certified copy of such order,
- G shall cause to be made on the register document of title relating to the land affected by the notice or order as the case may be, a note of the existence of the rights under such notice or order.

- [43] One may pose this question. Why does s 11(10) of the said Act require
- H a statement from the District Land Administrator stating that no objection has been lodged by the owner or occupier? The answer can be seen in s 11(4) of the said Act which states that, *The objection may be made to the District Land Administrator, either verbally or in writing*. Now, since an objection could have been lodged verbally by the owner by turning up at the district
- I land administrator's office, the licensee must necessarily seek a *written statement* from the district land administrator stating that no objection has been lodged by the owner or occupier. In the absence of such a written statement, the licensee is in no position to presume that there was no objection. It must be borne in mind that such a statement is an essential

document which has to be produced by the licensee in order to comply with s 11(10) of the said Act as alluded to above. A

[44] It is obvious from a plain reading of s 11(6) and 11(7) of the said Act that if there is any objection lodged by the owner or occupier of the land then s 11(5) of the said Act does not create any right of entry at all. The effect of a notice under s 11(2) of the said Act is completely nullified even if there was just a verbal objection lodged by an occupier. Once there is an objection lodged, whether verbally or in writing, the licensee can obtain a right of entry if and only if the licensee manages to convince the District Land Administrator to issue an order under s 11(7) of the said Act or if the State Authority, upon an appeal by the licensee, decides to vary the Land Administrator's order and authorises the licensee to enter the land. B C

[45] Section 2 of the said Act defines a *licensee* as a person licensed under s 9 of the said Act. And for convenience, s 9 of the said Act enacts as follows: D

9 (1) Subject to such exemptions as may be prescribed, no person, other than a supply authority, shall —

- (a) use, work or operate or permit to be used, worked or operated any installation; or E
- (b) supply to or for the use of any other person energy from any installation,

except under and in accordance with the terms of a licence expressly authorizing the supply or use, as the case may be. F

[46] In the context of the present appeal, the appellant here is the licensee.

Immaterial error in the high court judgment G

[47] Learned counsel for the respondent was candid to admit that there was an error in his submission at the High Court level which ultimately gave the High Court judge a mistaken impression that there was a Land Administrator's order under s 11(7) of the said Act instead of just a notice under s 11(2) of the said Act issued by the appellant to enter the three lots of land purchased by the respondent. This error was found in the High Court judge's grounds of judgment when he referred to the *Land Administrator's order* (instead of the notice under s 11(2) of the said Act) while expounding s 11(10) of the said Act. We agree with the submission of learned counsel for the respondent who submitted that it was an immaterial error curable under s 72 of the Courts of Judicature Act 1964 and that section enacts as follows: H I

72 Immaterial errors

- A No judgment or order of the High Court, or of any judge, shall be reversed or substantially varied on appeal, nor a new trial ordered by the Court of Appeal, on account of any error, defect, or irregularity, whether in the decision or otherwise, not affecting the merits or the jurisdiction of the Court.
- B [48] There is no doubt that s 11(10) of the said Act provides for the notation of both the notice under s 11(2) of the said Act and the order under s 11(7) of the said Act because s 11(10) of the said Act uses the phrase ... *as the case may be* Since it is intended to ensure that a notation of either a
- C notice under s 11(2) of the said Act or an order under s 11(7) of the said Act is made on the register document of title of the affected land, we, accordingly, rule that the said error was an immaterial error which did not affect the High Court judge's interpretation of s 11(10) of the said Act. Section 72 of the Courts of Judicature Act 1964 would save the day because it is applicable to
- D this type of situation.

The state authority's powers under the said act

- E [49] For the purpose of giving the licensee permanent rights over the land, s 11(8) of the said Act empowers the state authority to direct acquisition of the land instead of issuing any order under s 11(7) of the said Act. This could only refer to the Land Acquisition Act 1960 (Act 486) (Revised 1992) as alluded to in the High Court judgment. The National Land Code 1965
- F ('NLC') was enacted to vest powers to control the use of land in the hands of every state authority.
- G [50] The said Act is consistent with the NLC as could be seen from the powers given to the state authority under ss 11(7) and 11(8) of the said Act to decide whether to issue an order under s 11(7) of the said Act or to direct acquisition of the land permanently under s 11(8) of the said Act. Section 14 of the said Act further augmented the powers of the state authority to decide on the fate of the supply line that has been laid or posts or equipment erected.
- H In essence, s 14 of the said Act gives the state authority the absolute power to order the licensee to remove its electricity line, posts or equipment from any land as well as ordering the licensee to bear all the costs of the removal ... *as the state authority may consider equitable in the circumstances of the case* (see the final part of s 14(2)(a) of the said Act). Learned counsel for the
- I respondent submitted that this provision is to cover our present kind of situation where a bona fide purchaser is the victim of the appellant's failure to comply with the said Act. We agree with this submission. The gist of the learned counsel's submission is that the appellant is at fault and in fairness must be ordered to take some amount of responsibility.

Is s 14 of the said act irrelevant in this case?

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[51] What happens if the state authority decides to direct a licensee to re-align a proposed electricity line before it was erected? In theory, a licensee may ignore the state authority because s 14 of the said Act mentions the removal of a supply line which has been erected on any land under s 11 of the said Act. But, the practical reality of the matter is this. That no licensee would deliberately act in defiance of the state authority's direction because the licensee knows that if it defiantly refuses to comply with a state authority's direction, an order under s 14 of the said Act could be issued to order the removal of the line as soon as it is erected.

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[52] One must be pragmatic. And the political reality dictates that if an electricity line is already in use like the case of *Tenaga Nasional Bhd v Dolomite Industrial Park Sdn Bhd* [2000] 2 MLJ 133 CA, no state authority is likely to issue any order under s 14 of the said Act which would lead to disruption of electricity and a public uproar. Given the practical scenario, it makes sense for the High Court judge to issue the interlocutory injunction in order to preserve the status quo while awaiting a decision to be made by the state authority or a substantive order to be made by the High Court judge on whether to issue any declaration which has the effect of annulling the notice issued under s 11(2) of the said Act by the licensee ten (10) years nine (9) months ago in September 1997. Indeed, one of the guidelines set out by this court in *Keet Gerald* requires the High Court judge to consider the practical realities of the case.

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[53] It deserves repetition to say that, *The object of an interlocutory or interim injunction is to preserve matters pending the trial of matters in dispute....* (Halsbury's Laws of England, (4th Ed) Vol 24, p 512). In *The Siskina (Owners of Cargo Lately Laden On Board) & Ors v Distos Compania Naviera SA* [1979] AC 210, the House of Lords held that an application for an interlocutory injunction was not a separate cause of action, but merely an ancillary claim, unable to exist by itself. And Lord Diplock at p 256 had this to say:

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A right to obtain an interlocutory injunction is not a cause of action. It cannot stand on its own. It is dependent upon there being a pre-existing cause of action against the defendant arising out of an invasion, actual or threatened by him, of a legal or equitable right of the plaintiff for the enforcement of which the defendant is amenable to the jurisdiction of the court. The right to obtain an interlocutory injunction is merely ancillary and incidental to the pre-existing cause of action. It is granted to preserve the status quo pending the ascertainment by the court of the rights of the parties and the grant to the plaintiff of the relief to which his cause of action entitles him, which may or may not include a final injunction.

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A *En passant*, it must be emphasised that the absolute power given by s 14 of the said Act to the state authority to order the licensee to remove its electricity line, erected by using the right of entry under s 11 of the said Act, supports the High Court judge's observation that the rights under s 11 of the said Act are indeed temporary and revocable.

B *Are there bona fide serious issues?*

C [54] The appellant is solely relying on the notice under s 11(2) of the said Act which they issued on 16 September 1997 — the material period; while the respondent, as stated earlier, purchased the six lots of land at a public auction on 23 April 2007. The appellant conceded that they did not comply with s 11(10) of the said Act at the material period.

D [55] The detailed application of ss 11 and 14 of the said Act to the facts of this case are substantive issues for the High Court to hear and decide whether to issue the declarations sought by the respondent. In order to comply with s 11(10) of the said Act, the appellant would need to produce to the registrar of land titles their notice under s 11(2) of the said Act together with a statement from the District Land Administrator stating that no objection has been lodged by the owner or occupier of the three (3) lots of land. Perhaps the appellant do not have such a statement because they did not comply with s 11(10) of the said Act. In any event, they certainly did not exhibit any such statement in their affidavits.

F [56] Be that as it may, it remains a serious bona fide issue to be considered by the High Court judge and that bona fide issue centred on the following question: whether a licensee could be said to acquire rights under s 11(5) of the said Act upon obtaining a written statement from the district land administrator stating that no objection has been lodged by the owner or occupier of the three (3) lots of land or only after complying with s 11(10) of the said Act? Otherwise, what is the legal position if the licensee had in fact changed their mind after issuing the notice under s 11(2) of the said Act or even after obtaining an order under s 11(7) of the said Act?

H [57] That was what exactly happened in *Cekal Berjasa Sdn Bhd v Tenaga Nasional Bhd* [2006] 4 MLJ 284, a decision of mine when I sat at the High Court. In that case, all that Tenaga Nasional Bhd did was to issue a letter stating that they have cancelled their plan to enter the land even though they have obtained an order under s 11(7) of the said Act years earlier. In this appeal, the stand taken by the appellant regarding the right of entry under s 11 of the said Act as revocable by way of a letter does support the High Court judge's observation that the s 11 rights are indeed temporary and revocable.

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[58] The other serious issue is whether estoppel is applicable? While he was at the High Court bench, my learned brother Low Hop Bing JCA had in *Tenaga Nasional Bhd v Perwaja Steel Sdn Bhd* [1995] 4 MLJ 673 correctly invoked the doctrine of estoppel against Tenaga Nasional Berhad concerning the said Act. His Lordship followed the ratio enunciated by the Federal Court in *Boustead Trading [1985] Sdn Bhd v Arab-Malaysian Merchant Bank Bhd* [1995] 3 MLJ 331, at p 344 which held that:

The time has come for this court to recognise that the doctrine of estoppel is a flexible principle by which justice is done according to the circumstances of the case. It is a doctrine of wide utility and has been resorted to in varying fact patterns to achieve justice. Indeed, the circumstances in which the doctrine may operate are endless.

[59] Looking at estoppel, on a wider perspective, it has always been perceived that estoppel involves the principles of justice and equity. It concerns the principle that a person who has led another to believe in a certain state of affairs from going back on the words or conduct when it is unjust or unconscionable for him to do so (per Lord Denning MR in *Moorgate Mercantile Co Ltd v Twitchings* [1976] 1 QB 225 at p 241; [1975] 3 All ER 314 at p 323 CA). In modern times estoppel by representation is frequently applied and invoked. It arises when there is representation made either by statement or by conduct. It is said that conduct must necessarily include negligence (*Freeman v Cooke* [1848] 2 Exch 654 at p 664) and silence (*Pacol Ltd & Ors v Trade Lines Ltd and R/I Sif IV ('The Henrik Sif')* [1982] 1 Lloyd's Rep 456).

[60] Is it negligence on the part of the appellant for not entering the respondent's land for the last ten (10) years and nine (9) months ago and at the same time arguing that the appellant had the right of entry notwithstanding the delay? We leave that question for the High Court judge to decide. Whether the doctrine of estoppel is applicable is an issue that should be decided by the High Court judge. We are here, legally constituted, to decide whether the High Court judge had exercised his discretion judiciously (the final test laid down by this court in *Keet Gerald*) and that being the case we should not usurp the High Court judge's role by making any further substantive observations. Suffice, at this juncture, for us to rule that the respondent had passed, with flying colours, the first test of showing bona fide serious issues as laid down by this court in *Keet Gerald*.

JUSTICE OF THE CASE OR THE BALANCE OF CONVENIENCE TO BE READ WITH THE PUBLIC INTEREST FACTOR

[61] After Merdeka, in Malaya and then Malaysia, electricity was provided

- A solely by the National Electricity Board — commonly referred to by its acronym ‘NEB’, which was set up under the Electricity Act 1949 which was repealed by s 56(1) of the said Act. Section 14 of the Electricity Act 1949 made all members, officers and servants of the NEB public servants within the meaning of the Penal Code while s 13 of the Electricity Act 1949
- B specifically made the Public Authorities Protection Ordinance 1948 applicable to protect the NEB. All these was because NEB then was truly a statutory board with non-profit objectives.

- C [62] The appellant, in the present appeal, is a public listed company and is licensed to supply electricity under the said Act. The provision of electricity is definitely a public purpose activity. That cannot be doubted. But, the concept of public purpose is not intended to grant blanket immunity to licensees under the said Act. The public purpose factor is intended to literally
- D put the interest of the public above other considerations. The pertinent question to pose would be this: whether the appellant is entitled to use the concept of *public purpose* as a shield to avoid the consequences of failing to comply with an important provision of the said Act, namely, s 11(10)? We must bear in mind that the effect of non-compliance defeats the conclusiveness of the register document of title. It erodes the core of our
- E Torrens system. The cornerstone of the Torrens system is simply this. That title is obtained not from the execution of the statutory instrument but from its registration.

- F [63] Now, if Parliament had intended to grant a blanket immunity to the licensees, specific provisions similar to s 72 of the Pengurusan Danaharta Nasional Act 1998, which prohibit the issuance of any injunction against Danaharta, would have been enacted in the said Act. But there is none.

- G [64] If a licensee, like the appellant in this case, issues a notice under s 11(2) of the said Act but fails to comply with s 11(10) of the said Act and also does not enter the land for years, there is absolutely no clue for the public to know if the land is the subject of any proposed electricity line. In such a situation, the public interest factor comes to the forefront. Our NLC which
- H is based on the Torrens system of conclusiveness of the register document of title must be vigorously applied when considering the public interest factor.

- I [65] Section 11(10) of the said Act was definitely enacted for the purpose of ensuring that all s 11 rights of entry over any land — be it by way of a notice under s 11(2) of the said Act coupled with a no objection statement issued by the Land Administrator or an order under s 11(7) of the said Act — should be noted on the register document of title with all convenient speed as soon as they take effect. Can this panel make a ruling which has the effect of saying that the members of the public in Malaysia are not permitted

to rely on land title searches and be protected by the law when they make those searches in the land office? The answer would certainly be in the negative.

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[66] The respondent has every reason to rely on the register document of title because they purchased the land from an auction held by the Malacca High Court and not from the previous registered proprietor. The respondent was entitled to presume that there was no error in the Register Document of Title.

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[67] The appellant's failure to comply with s 11(10) of the said Act has absolutely nothing to do with the public purpose of providing electricity. An argument advanced along these lines are certainly erroneous. It is an argument that is analogous to saying that hospitals could never be found liable for medical negligence because they exist for the public purpose of saving lives. It is only fair and reasonable to conclude that a licensee under the said Act, which includes the appellant herein, is entitled to invoke public purpose only when it concerns their public purpose function of supplying electricity. Otherwise it would tantamount to granting the licensees absolute immunity to ignore the provisions of the said Act which had been carefully drafted to protect the interests of the public. It would lead to chaos, uncertainty and confusion.

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[68] In *Munro v Wivenhoe and Brightlingsea Rly Co* (1865) 4 DE GJ & S 723 at p 733; 46 ER 1100, at p 1104, Turner LJ aptly said:

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This court when called upon to grant an interlocutory injunction will act according to the justice of the case as ascertained upon the evidence before it and according to the comparative injury which may arise from granting or withholding the injunction.

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[69] This panel will certainly take into account the particular probability that an injury will, if not restrained, take place and this is an important consideration in the context of the hardship or inconvenience to the respondent that would be involved if the interlocutory relief of an injunction is refused. According to the case of *Beese & Ors v Woodhouse & Ors* [1970] 1 WLR 586 at p 591, that in all cases where an interim or an interlocutory injunction is sought the court must decide *what, on the balance of convenience, is the right order, and where lies the major risk of damage, and in particular of any irreparable damage.*

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[70] At p 50 of AR-J1 and at p 74 of the MLJ reporting and at pp 51–52 of AR-J1 and the equivalent pp 74–75 of the MLJ reporting, the High Court judge applied the test in *Keet Gerald* and concluded that the respondent had

- A succeeded in raising serious bona fide issues to be tried and that the balance of convenience tilted in favour of the respondent.

DAMAGES ARE NOT QUANTIFIABLE

- B [71] By way of an observation, it would be ideal to state that the appellant's letter dated 31 January 2008 marked as 'TBH-24' and annexed as an exhibit to Teo Boon Hoo's third affidavit that was affirmed on 6 May 2008 as seen in encl 30 was not a letter offering to pay the respondent damages but instead
C the appellant had asked the respondent to foot the sum of about RM10m to carry out the re-alignment in order to resolve the problem.

- D [72] The appellant's stand based on this letter is certainly something for us to consider in order to gauge *where the justice of the case lies* to borrow the phrase used by this court in *Keet Gerald*. We are mindful of the guidelines in *Keet Gerald* which reminded High Court judges that an interlocutory injunction is a remedy that is discretionary and intended to maintain the status quo until the High Court decides on the substantive issues.

- E [73] Although the area within the respondent's land that is directly beneath the transmission line may only be about four (4) acres, we must bear in mind that the transmission line would be cutting through the middle of the proposed housing estate and not through some oil palm estate. The actual
F area affected would be much larger than just four (4) acres and quite impossible for the respondent to prove and quantify the damage caused. Since the appellant's affidavit had shown that it is still possible to re-align the transmission line, the effect on future residents who would be living very close to the transmission line, which is said to be 500 meters long, is actually
G a public interest factor that has to be considered by the High Court judge in the course of the hearing.

- H [74] Counsel on both sides referred us to a plan exhibited in the appellant's affidavit which showed that there was a proposed re-alignment line shown therein. At this stage, it is not for us to decide whether there should be any re-alignment or how any re-alignment is to be done. The plan is only relevant to show to us that the respondent who prepared it was indeed serious and earnest about finding a practical solution — as stated in their solicitors' letter dated 8 September 2007 exhibited in Teo Boon Hoo's affidavit dated
I 19 November 2007. The appellant's reply dated 31 January 2008 is proof that it is not impossible or too late to re-align the short segment to avoid cutting through the middle of the respondent's future housing estate. However, instead of apologising for the inconvenience caused due to their failure to comply with s 11(10) of the said Act, the appellant had the audacity to ask

the respondent to foot the sum of about RM10m to carry out the re-alignment. It is apparent, that at the end of the day, it is purely a matter of ringgit and sen.

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[75] With respect, if the appellant had taken immediate steps in June 2007 after being alerted about the problem caused to the respondent due to their failure to comply with s 11(10) of the said Act, they would most probably have resolved the problem by now. Sadly, from the affidavits and the chronology of events shown to us during submissions, the appellant took no remedial actions.

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DAMAGES AN INADEQUATE REMEDY

[76] In considering whether damages is an adequate remedy, it is useful to refer to the case of *Alor Janggus Soon Seng Trading Sdn Bhd & Ors v Sey Hoe Sdn Bhd & Ors* [1995] 1 MLJ 241, a decision of the Supreme Court with a coram of Jemuri Serjan CJ (Borneo), Edgar Joseph Jr and Eusoff Chin SCJJ. The brief facts of that case may be stated as follows. There the appellants, who were the plaintiffs in the High Court, held about 43.75% of the shares in a company by the name of Sey Hoe Sdn Bhd which was named as the first respondent ('the company'). The company in turn owned 682,500 shares in another company known as MGR Timber Marketing Sdn Bhd which later on was known as MGR Corp Sdn Bhd ('MGR'). The appellants/plaintiffs were aggrieved because they discovered that the respondents/defendants sold the MGR shares owned by Sey Hoe Sdn Bhd without disclosing to them that MGR had applied to be listed on the second board of the Kuala Lumpur Stock Exchange and was to offer 2.9m shares at RM2.30 each to the members of the public. The appellants/plaintiffs who were shareholders brought an action alleging fraud on themselves as the minority shareholders and alleging that the shares sale agreement was invalid as it was a device to defraud all the shareholders of the company because the shares would have fetched a higher price in the open market once MGR became public-listed. An ex parte interlocutory injunction was issued upon the appellants/plaintiffs' application but subsequently set aside at the inter parte stage. Being dissatisfied, the appellants/plaintiffs appealed to the Supreme Court. The Supreme Court allowed the appellants/plaintiffs' appeal and restored the interlocutory injunction until further order.

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[77] The judgment of the Supreme Court in *Alor Janggus* is good law and had been cited and followed in several subsequent cases. The relevant ratio decidendi of the judgment in *Alor Janggus* concerns the part that dealt with the issues of adequacy of damages and the balance of convenience. On the factual findings, His Lordship Jemuri Serjan CJ (Borneo) began by saying (see p 246 of the report):

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A This is an interlocutory appeal by a group of minority shareholders following the dissolution of an ex parte interlocutory injunction granted on 2 April 1993 by the High Court, Penang by the same judge who granted the ex parte interlocutory judgment.

B [78] Continuing at p 248 of the report, His Lordship Jemuri Serjan CJ (Borneo) had this to say:

C As a representative of the company in MGR, Lim Cheng Teek had attended several meetings of MGR and, therefore, was in possession of inside firsthand information that MGR would be public-listed on the KLSE second board in consequence of which MGR shares would most probably fetch a higher price in the open market. On 19 September 1992, *The Star* carried a news item in its business section that MGR was seeking a listing on the KLSE second board and in that event would be offering 2.9m shares at RM2.30 each. However, it was averred that Lim Cheng

D Teek never at any time disclosed to the shareholders of the company that MGR would be public-listed on the KLSE second board and the probable profits that would accrue therefrom.

E [79] And touching on the judgment of the High Court, His Lordship Jemuri Serjan CJ (Borneo) continued to say at pp 251–252 of the report:

F On the facts as he found them from the affidavit evidence, his Lordship was satisfied that the plaintiffs had no locus standi to bring the action against the defendants. Even assuming that the plaintiffs were the minority shareholders, based on the authority of *Hew Sook Ying v Hiw Tin Hee* [1992] 2 MLJ 189, SC, His Lordship found no evidence that the plaintiffs had attempted to resolve their grievances at the board of directors' meeting or the annual general meeting of the company. Furthermore, there was no evidence that the first and second defendants refused to allow the action to be taken by the company itself. Having regard to these principles, he found: (a) that the action of the plaintiffs was misconceived; (b)

G while admitting that the plaintiffs had established a cause of action, nevertheless the action was misconceived for the same reasons as he explained above; (c) as the remedy sought by the plaintiffs was damages for the loss of profits, damages was an adequate remedy. The loss suffered by the plaintiffs was financial loss in that after the sale of the company's shares in MGR to Choong Keong Kor and after the public listing of the MGR shares, the value of the shares appreciated considerably. Therefore, if there was such a loss damages could be ascertained; (d) on the

H question of the balance of convenience, the balance was in favour of the defendants since the purchase price of the shares had been fully paid and the charge on the land was already released by Choong Keong Kor.

I [80] On the application of *American Cyanamid Co v Ethicon Ltd* [1975] AC 396; [1975] 1 All ER 504; [1975] 2 WLR 316, His Lordship Jemuri Serjan CJ (Borneo) remarked as follows (see p 253 of the report):

However, as is stated in *Hubbard v Vosper* [1972] 2 QB 84; [1972] 1 All ER 1023; [1972] 2 WLR 389 and approved by Lord Diplock in *American Cyanamid's* case [1975] AC 396 at p 407D; [1975] 1 All ER 504 at p 510; [1975] 2 WLR 316 at p 322 the discretion of the court to grant or refuse an interlocutory injunction should not be fettered by laying down any rules which would have the effect of limiting the flexibility of the remedy.

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[81] Now, what this court held in *Keet Gerald* at p 207 of the MLJ report in setting out the guidelines to be followed when considering whether to issue an interlocutory injunction was in fact re-stating the principle that the discretion of the court to grant or refuse an interlocutory injunction should not be fettered by laying down any rules which would have the effect of limiting the flexibility of the remedy. There, this court in *Keet Gerald* put it in these nice words as reproduced earlier:

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- (2) having found that an issue has been disclosed that requires further investigation, he must consider where the justice of the case lies. In making his assessment, he must take into account all relevant matters including the practical realities of the case before him.

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[82] On the issue of the adequacy of damages, His Lordship Jemuri Serjan CJ (Borneo) in *Alor Janggus* aptly said (see pp 269 – 270 of the report):

Encik Ghazi submitted that since the claim was the loss of profits on the sales of MGR shares to Choong Keong Kor, damages would be an adequate remedy which could be quantified and the question of interlocutory injunction did not arise. With respect, we disagree with his submission. A look at the prayers show that several different damages are claimed and are reproduced here for convenience:

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(v-a) loss resulting from the increase of the original 628,500 shares to 1,365,000 shares after public listing of MGR;

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(v-b) loss from the sale of 292,500 MGR shares to members of the public without the knowledge of the plaintiffs;

(v-c) loss as a result of the transfer of 424,500 shares to UWB Nominees Sdn Bhd;

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(vi) general damages following the fraud;

(vii) loss as a result of misuse of information by the second defendant;

(viii) exemplary damages; and

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(ix) aggravated damages.

The majority of these damages clearly do not admit of easy quantification and it would not be right for us to venture into the realm of speculation as to what the exact quantum would be at this stage of the proceedings. Besides, the value

- A of the shares fluctuate from time to time. In this regard we find support in the observation of Sach LJ in the case of *Evans Marshall & Co Ltd v Bertola SA & Anor* [1973] 1 All ER 992 at p 1005; [1973] 1 WLR 349 at p 380 thus:
- B The courts have repeatedly recognised that there can be claims under contracts in which, as here, it is unjust to confine a plaintiff to his damages for their breach. Great difficulty in estimating these damages is one factor that can be and has been taken into account. Another factor is the creation of certain areas of damage which cannot be taken into monetary account in a common law action for breach of contract: loss of goodwill and trade
- C reputation are examples — see also, in another sphere, the judgment of Jenkins LJ in *Vine v National Dock Labour Board* [1956] 1 QB 658 at p 676 which, albeit a dissenting judgment, was unanimously adopted in toto in the House of Lords. Generally, indeed, the grant of injunctions in contract cases stems from such factors.
- D In view of the doubt as to the adequacy of the remedies, it is incumbent upon us now to deal with the question of balance of convenience.
- E [83] Continuing at the same page and spilling over to p 271 of the report, His Lordship Jemuri Serjan CJ (Borneo) succinctly said:
- F Be that as it may, the grant or refusal of an interlocutory injunction must be decided on the fundamental principle that the court should take whichever course that appears to carry the lower risk of injustice. We are engaged in weighing the respective risks that injustice may result from deciding one way rather than the other at the stage when the evidence is incomplete. On the one hand, there is the risk that if the interlocutory injunction is refused but the plaintiffs succeed in establishing at the trial their legal rights to the protection for which the injunction
- G has been sought they may in the meantime have suffered harm and inconvenience or monetary loss for which an award of money can provide no adequate recompense.
- H [84] Jemuri Serjan CJ (Borneo) in *Alor Janggus* concluded his judgment in this way (see p 272 of the report):
- I Having regard to our observations above, it can be seen that at one end of the spectrum of possibilities if the plaintiffs fail at the trial, all that the defendants would suffer because of the injunction is the loss of profits and costs of the litigation which can be quantified and the defendants could adequately be compensated and at the other end if the injunction is refused and the plaintiffs should succeed, they would suffer unquantified monetary loss, harm and inconvenience which could not be adequately recompensed. In that case, more injustice would be done to the plaintiffs.

[85] And His Lordship Jemuri Serjan CJ (Borneo) then made the following orders: A

(a) At p 272 of the report as follows:

For the reasons we have given above on all the issues raised in this appeal, we are all of the view that this appeal should be allowed with costs here and below and the interlocutory injunctive orders be restored until further order. The deposit is to be refunded to the plaintiffs. B

(b) And at p 273 of the report as follows: C

Finally, in the interest of justice there will also be an order for an early trial.

[86] What is evident from the facts in *Alor Janggus* is that the appellants/plaintiffs there had sought, inter alia, damages. And *Alor Janggus* is good law to hold that the justice of the case should take precedence and where there is any doubt as to the adequacy of the remedy of damages, it is incumbent upon the court to regard damages as an inadequate remedy and then move on to consider the question of the balance of convenience. His Lordship Jemuri Serjan CJ (Borneo) rightly said in *Alor Janggus* that *the grant or refusal of an interlocutory injunction must be decided on the fundamental principle that the court should take whichever course that appears to carry the lower risk of injustice*. This principle must be vigorously applied to the present appeal because the respondent is an innocent purchaser who relied on a search of the register document of title to purchase from a public auction held at the High Court of Malacca. There was no way that the respondent could have known of the notice under s 11(2) of the said Act issued by the appellant some 10 years and 9 months earlier. Before us, we have a black and white evidence from the appellant which stated that it is not impossible to re-align the proposed transmission line but the appellant wanted the respondent to foot the bill of RM10m without any explanation as to how the appellant had arrived at that figure. Although it is not for us to make any ruling regarding any re-alignment of the transmission line, this factor is certainly relevant in considering where the justice of the case lies and whether the status quo should be preserved while awaiting a substantive judgment to be made by the High Court of Malacca or the decision of the State Authority of Malacca. D E F G H

[87] At this stage, we must bear in mind that the injunction is an interlocutory injunction and shall remain only until the High Court of Malacca makes a decision on the respondent's claim — which could possibly include an order that has the effect of annulling the proceedings under s 11 of the said Act commenced by the appellant 10 years and 9 months ago but, I

- A sadly, were not noted on the register document of title. For these reasons, we should not lightly disturb the exercise of discretion by the High Court judge.

THE ISKANDAR DEVELOPMENT PROJECT IN JOHOR

- B [88] Any reference to the Iskandar Development project in Johor is quite irrelevant in the context of the appellant's failure to comply with s 11(10) of the said Act. At this juncture, we take judicial notice that the *Tanjong Bin power generation plant in Johore* which is closer to the Pelabohan Tanjung Pelepas is already in operation and located within the proposed Iskandar Development region.

- D [89] A judge takes judicial notice when he or she accepts the truth of a certain matter without requiring proof. And when a judge *notices* a fact, that fact becomes part and parcel of the judgment of the judge. The doctrine of judicial notice allows judges to *notice* information that would not otherwise come before the court thereby expanding the background against which the judgments of the judges are made.

- E [90] Judicial notice is beneficial. It allows judges to make sure that the legal system does not produce results that are contrary to what everyone agrees is plainly the case. What is indisputable, what is notorious and what is known to the relevant community would attract the doctrine of judicial notice (see F *Edmund M Morgan 'Judicial Notice'* [1944] Vol LVII, Harvard Law Review 269).

- G [91] The existence of the *Tanjong Bin power generation plant in Johor* which is closer to the Pelabohan Tanjung Pelepas is notoriously known to the community there and we are justified in taking judicial notice that that generation plant is already in operation.

- H [92] Be that as it may, there is no factual basis to say that the Iskandar Development region, some 200km away in Johor, is awaiting the appellant's proposed transmission line from *Sg Mati* in Muar to *Kelemak* in Melaka to be erected.

THE AUTHORITIES THAT WERE REFERRED TO

- I [93] It is now opportune to refer to the authorities that were raised before us.

[94] In *Tenaga Nasional Bhd v Dolomite Industrial Park Sdn Bhd*, which was also considered by the High Court judge, this court dismissed the appeal of the appellant there but set aside both the prohibitory injunction and the mandatory injunction. The injunctions were substituted with an order for damages to be paid by the appellant there to the respondent there who was the registered proprietor of the land. The quantum of the damages was to be assessed by the senior assistant registrar of the High Court.

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[95] In *Dolomite*, the critical factor was that those pylons formed part of the existing national grid for the conveyance of electricity. Compliance with the injunctions would have led to immediate disruption of electricity supply. If the facts of the present appeal were similar to *Dolomite* and have the effect of disrupting the electricity supply for the nation, we would have decided similarly without further ado and set aside the injunction.

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[96] However, unlike the *Dolomite's* case, the appellant here has yet to enter the respondent's land even though the appellant's notice under s 11(2) of the said Act was issued in 1997. If the respondent succeeds on their substantive claim at the High Court below, the notice under s 11(2) of the said Act issued by the present appellant might well be declared invalid and be set aside.

E

[97] The respondent here had complained about the appellant's failure to comply with s 11(10) of the said Act to the authority in charge of land matters in Malacca, that is, the state authority. We are not in a position to exclude the possibility of the state authority directing the appellant here to re-align the transmission line out of or to the border of the respondent's land. It is undisputed that the Honourable Chief Minister of Melaka had personally chaired two meetings so far which were attended by representatives of both parties to discuss the issue of development of the respondent's land and the problem of the appellant's proposed transmission line.

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[98] The appellant cited the case of *S Kulasingam & Anor v Commissioner of Lands, Federal Territory & Ors* [1982] 1 MLJ 204, and submitted that s 11(10) of the said Act is a *directory and not a mandatory provision*. The first judgment reported therein is that of the High Court while the second judgment is that of the Federal Court. A close reading of the Federal Court judgment of that case shows that it does not assist the appellant. At p 212 of the report, Abdoolcader J, speaking for the Federal Court had this to say:

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... s 8(1) requires the declaration in Form D to be published in the *Gazette* for general information, we are of the view that the provisions of s 9(1)(b) are directory and not mandatory as its purpose is in substance also covered by the publication of the declaration in Form D in the *Gazette* under s 8(1).

- A This court has also in *Ng Yit Seng & Anor v Syarikat Jiwa Mentakab Sdn Bhd & Ors* [1981] 2 MLJ 194, 195 dealt (at p 195) with the doctrine of substantial compliance in regard to directory requirements. This has in our view been met in this case as there is no specific time limit stipulated in s 9(1) and the omission was in fact repaired and the requisite notation made some two months after the publication of the declaration in Form D.
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- [99] Now, what is the ratio decidendi of *Ng Yit Seng & Anor v Syarikat Jiwa Mentakab Sdn Bhd & Ors* [1981] 2 MLJ 194? I have anxiously read *Ng Yit Seng's* case, a decision of the then Federal Court, and I note that the then Federal Court had held that even if a requirement is directory, substantial compliance is still necessary. At p 195 of the report of *Ng Yit Seng's* case at para 'H' at the left hand column, the then Federal Court had this to say:
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- D ... that even in relation to directory provisions substantial compliance is still necessary and that the failure to observe directory requirements may also lead to invalidity.

- [100] In the present appeal at hand, regardless of whether s 11(10) of the said Act is mandatory or directory, there had been complete failure by the appellant to comply with it. That cannot be doubted.
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- [101] Learned counsel for the appellant submitted that no time limit is stipulated in s 11 of the said Act. In reply thereto, learned counsel for the respondent cited the Federal Court judgment of *Pemungut Hasil Tanah, Daerah Barat Daya, Pulau Pinang v Ong Gaik Kee* [1983] 2 MLJ 35, which was also considered by the High Court judge, where at p 37 the Federal Court speaking through Salleh Abas CJ (Malaya) held that even where no time limit was stipulated in a statute, unreasonable delay is sufficient ground to declare the proceedings as illegal. At pp 37–38 of the report, Salleh Abas CJ (Malaya) had this to say:
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- H It is true that s 10 of the Act does not prescribe the time within which the inquiry into the compensation must be held but looking at the Act as a whole no one could deny that the proceedings under the Act are meant to be in a continuous motion so that no such interruption or such undue delay or stoppage as to amount to an abandonment of the acquisition could be regarded as within this motion. Under s 38 of the Interpretation and General Clauses Ordinance 1948 it is provided that

- I Where no time is prescribed or allowed within which anything shall be done, such thing shall be done with all convenient speed and as often as the prescribed occasion arises.

What then is the 'convenient speed'? In our view it must be 'as soon as possible' or 'within a reasonable time', and not 'as late as possible'. Obviously what amounts to 'convenient speed' must vary from case to case and in our judgment seven years

delay is certainly not a 'convenient speed' as it is so far outside the normal period of time that no reasonable authority could ever regard it as reasonable. That being the case the court is entitled to strike down the impugned acquisition proceedings as illegal. (*Regina v St Albans Crown Court, Ex-parte Cinnamond* [1981] QB 480 and *Regina v Tottenham Justices, Ex-parte Dwarkados Joshi* [1982] 1 WLR 631).

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[102] Another Federal Court authority cited which shows that there are serious bona fide issues for the High Court below to consider would be the case of *Pow Hing & Anor v Registrar of Titles, Malacca* [1981] 1 MLJ 155. Now, *Pow Hing*, which was also considered by the High Court judge, dealt with the effect of the failure to endorse a note of the service of a notice of demand on the registered proprietor as required by s 97(2) of the NLC on the register document of title to the land to which the notice of demand relates. That failure to endorse was held by the Federal Court to be fatal even though there was nothing in s 97 of the NLC that says that such an endorsement is a pre-condition of forfeiture proceedings. What the Federal Court was concerned was that the failure to endorse had resulted in the register document of title omitting to show the land was subject to forfeiture proceedings. It is pertinent to note that the service of a notice of demand is to demand payment from the registered proprietor and need not necessarily entail the forfeiture of the land. Yet, the Federal Court held that the failure to endorse on the register document of title was fatal.

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Pow Hing had been followed in several subsequent cases and it is now trite law.

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[103] The facts in *Tenaga Nasional Bhd v Tekali Prospecting Sdn Bhd* [2002] 2 MLJ 707, CA, cited by the appellant's counsel are completely different and are not relevant to our present case. There, the issue was whether the High Court judge had quashed the notice under s 11 of the said Act on the grounds that the notice was illegal because the construction of the pylons and not mere posts did not fall within the definition of s 11(1) of the said Act. This is evident from the judgment of this court as seen at p 713 of the report:

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We begin by considering what we will call the 'illegality point'. This turns on a construction of s 11(1) of the Act. The relevant words in that subsection for the purposes of the instant appeal are 'such posts and other equipment as may be necessary or proper for the purposes of the licensed installation'. Do these words confine the appellant as licensee under the Act to merely constructing posts? With respect, we do not think so. If one looks at the definition of the word 'equipment' appearing in the phrase quoted above, found in s 2 of the Act, this is what it says:

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'equipment' includes any item for such purposes as generation, conversion, transmission, distribution or utilization of electrical energy, such as machines, transformers, apparatus, measuring instruments, protective devices, wiring materials, accessories and appliances ...

A [106] Continuing at p 714 of the report, this court had this to say in *Tekali Prospecting*:

B We, therefore, have no difficulty in rejecting the argument of counsel for the respondent advanced in the court below and accepted by the learned judge that s 11(1) of the Act is so restricted as to preclude the incorporation in it of the construction of transmission lines bearing pylons. It follows therefore that the s 11(2) notice in the present case is not tainted with any illegality. It is a perfectly valid document.

C CONCLUSION

D [107] Even if s 11(10) of the said Act could be swept under the carpet by holding that a notation on the register document of title is not a pre-condition for the right of entry, can the delay of ten (10) years nine (9) months give the respondent who purchased the land at an auction conducted by the High Court of Malacca any cause of action to apply to impugn the proceedings conducted under s 11 of the said Act following closely what had been decided in resembling situations in *Ong Gaik Kee* and *Pow Hing*? It is certainly a serious bona fide issue and a substantive matter of importance for the High Court judge to decide and it is not for us to decide at this stage.

F [108] I am of the considered view that the State Authority of Malacca is the appropriate authority to decide on whether there should be any re-alignment while the High Court below is the correct forum to decide whether the proceedings under s 11 of the said Act ought to be set aside or declared invalid, perhaps with liberty for the appellant to re-issue a fresh notice under s 11(2) of the said Act so that the respondent has an opportunity to be heard according to the processes as stipulated in s 11 of the said Act at the District Land Administrator's office.

G [109] If the High Court judge eventually decides in favour of the respondent and impugns the notice under s 11(2) of the said Act or if the state authority directs the appellant to re-align its proposed transmission line, then obviously the interlocutory injunction would have rightly served its purpose and proven to be justified. For these varied reasons, I am of the considered view that the interlocutory injunction should therefore be maintained but the High Court judge is directed to expedite hearing of the substantive claim. On the other hand, if the interlocutory injunction is to be set aside at this stage, the practical reality would be to shut out the state authority from considering the matter and also shut out the respondent from obtaining the declarations sought in the High Court below. It is akin to ordering the removal of a plaintiff/purchaser's private caveat before the plaintiff/purchaser has an opportunity to prove his case for a decree of specific performance against the defendant/vendor.

[110] Since I am of the view that the High Court judge had exercised his discretion judiciously, it is only fair for us to dismiss this appeal with costs but with an order that priority should be given to hear the respondent's substantive claims within this year. Deposit should rightly go to the respondent on account of taxed costs.

[111] My learned brothers, Low Hop Bing JCA and Sulaiman Daud JCA have read this judgment in draft and have expressed their agreement with it.

Appeal dismissed with costs.

Reported by K Nesan

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